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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE, Plaintiff and Respondent, v. JAVIER MIRANDA, Defendant and Appellant.	C053362 (Super. Ct. No. 06181)

APPEAL from a judgment of the Superior Court of Siskiyou County, William J. Davis, Judge. Affirmed in part and reversed in part.

William I. Parks, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Julie A. Hokans, Supervising Deputy Attorney General, Robert Gezi, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of Parts II through VI of the Discussion.

In this appeal the defendant challenges his conviction for the aggravated offense of transportation of a controlled substance for sale from one county to another noncontiguous county within the state as in violation of the corpus delicti rule. (Health and Saf. Code, § 11379, subd. (b).)[1], [2]

The corpus delicti rule precludes conviction where the corpus of the offense has been established on the basis of a defendant's uncorroborated statements. The corpus includes every element of the offense necessary to show "the fact of injury, loss, or harm, and the existence of a criminal agency as its cause." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168 (*Alvarez*).) The corpus does not include the identity of the perpetrator, the degree of the crime, or the enhancement of the

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[1] A reference to a section is to the Health and Safety Code unless otherwise designated or apparent from the context.

[2] A jury convicted defendant Javier Miranda of possession of methamphetamine for sale (count 1; § 11378); transportation of methamphetamine (count 2; § 11379, subd. (a)); and transportation of methamphetamine from a noncontiguous county for purpose of sale (count 3; § 11379, subd. (b)). As to all counts, the jury found that the methamphetamine was in crystalline form (Pen. Code, § 1170.74); as to count 1, the jury found that the amount was over 57 grams of a substance containing methamphetamine (Pen. Code, § 1203.073, subd. (b)(2)).

On defendant's motion, the trial court set aside his convictions on counts 1 and 2 because, as pled, they were lesser included offenses of count 3. The court then sentenced defendant to state prison for nine years (the upper term) on count 3. The court also imposed various fines, including two fines of $160 each described as a drug program fee and a criminalist lab fee (§§ 11372.7, 11372.5).

penalty for the offense. In the latter cases the corpus of the underlying offense has been established by evidence apart from the defendant's statements and satisfies the policy of the law that "one will not be falsely convicted, by his or her untested words alone, of a crime that never happened." (*Id*. at p. 1169.)

In this case the underlying offense of count 3 is the transportation of a controlled substance for sale. (§ 11379, subd. (a).) As to this offense the jury was instructed that the defendant may not be convicted "based on his out-of-court statements alone." However, on the issue of transportation between noncontiguous counties, required under subdivision (b) for imposition of an enhanced penalty for violation of subdivision (a), the court instructed the jury that it "may be proved by the defendant's statements alone."

Subdivision (b) of section 11379 provides that "the penalty provisions of subdivision (a)" shall be increased when any person "transports for sale any controlled substances specified in subdivision (a) within this state from one county to another noncontiguous county . . . ."[3] This does no more than enhance the sentence for the underlying subdivision (a) offense that was established by evidence apart from defendant's out-of-court statements.

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[3] Section 11379, subdivision (b), provides in full: "Notwithstanding the penalty provisions of subdivision (a), any person who transports for sale any controlled substances specified in subdivision (a) within this state from one county to another noncontiguous county shall be punished by imprisonment in the state prison for three, six, or nine years."

In the published portion of the opinion we hold that the corpus of an offense subject to the corpus delicti rule includes every element of the underlying offense necessary to show the fact of injury, loss, or harm, and the existence of a criminal agency as its cause, but does not include an element of an offense that does no more than aggravate the penalty for the underlying offense. (See *People v. Shoemake* (1993) 16 Cal.App.4th 243.)[4]

We shall remand the matter to the trial court for clarification or modification of the fines. In all other respects, we shall affirm the judgment.

FACTS

The defendant had stopped his car beside the highway for an inspection of tire chains by the highway patrol during a winter blizzard while driving north on Interstate 5 in Siskiyou County just south of the Oregon border. When asked for his driver's license he produced a Florida identification card, saying that he did not have a driver's license. His car was impounded when

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[4] In the unpublished portion of the opinion we reject the defendant's arguments that the court erred prejudicially by admitting statements obtained in violation of *Miranda* v. *Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*), that trial counsel provided ineffective assistance by conceding the statements' admissibility, that the court erred prejudicially by failing to instruct the jury that it could not convict defendant on both count 3 and the lesser included offenses and that the court's imposition of the upper term on count 3 violated *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856] (*Cunningham*). We do agree that the court erred in its imposition of fines.

it was found that his driver's license was suspended. Later a package of methamphetamine was found in the snow adjacent to the trunk of his vehicle.

When interrogated defendant said that he had bought the car the day before in Modesto for $9,500 in cash but had not received a pink slip or bill of sale. He said he came from Florida, but had been living with his brother in Modesto for three weeks; however, he did not know his brother's address or telephone number. These statements were used to show that defendant had transported a controlled substance through a non-contiguous county in support of the aggravated offense of section 11379, subdivision (b).

The details relating to the offense are as follows.

On January 18, 2006, around 5:00 a.m., CHP Officer Mark Andersen was on duty on Interstate 5 in Siskiyou County, just south of the Oregon state line. Blizzard conditions were backing up traffic on the highway. Posted in the northbound number-one lane, Andersen was checking for tire chains and citing drivers who had not put them on.

Andersen flagged down a Ford Mustang without chains, then contacted defendant, its driver and sole occupant. Directed to pull over into the center median behind Andersen's patrol car, defendant instead pulled over and stopped to the left of the patrol car.

Andersen opened defendant's right passenger door and asked to see his driver's license, proof of insurance, and registration card. Defendant produced only a Florida

identification card, saying he did not have a driver's license. After finding out that defendant's license was suspended, Andersen called dispatch for a tow truck to impound defendant's car.

Andersen directed defendant to get out and walk over to where Andersen was standing. Walking around the back of his car, defendant did so. They then walked to the right front of the patrol car, an area illuminated by the patrol car's spotlight. As defendant stayed there, Andersen walked around the front of defendant's car to check the vehicle identification number (VIN) through the front windshield.

In response to Andersen's backup call, CHP Officer Dan Staudenmayer arrived and did an inventory search of defendant's car. After searching the trunk, Staudenmayer walked toward the driver's side, where he noticed a set of footprints in the snow, extending from the driver's-side door toward the trunk, around the back, and toward Andersen's patrol car.

While Staudenmayer was searching defendant's car, Andersen handcuffed defendant, arrested him, put him in Andersen's patrol car, and drove to the CHP office.[5] Andersen took defendant to a

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[5] The jury was not supposed to learn why defendant was arrested at that time. During the in limine hearing on defendant's *Miranda* motion, it emerged that defendant was arrested because Staudenmayer had found a stolen Florida license plate in defendant's trunk. However, after the trial court granted defendant's *Miranda* motion, it also ruled this evidence inadmissible because its discovery was connected to the statements obtained in violation of *Miranda.* Staudenmayer nevertheless mentioned it in his testimony. The court granted

large briefing room in which four or five other officers were present, seated him, and handcuffed him to a bolt fastened to the wall. Andersen then went back to his desk 25 to 30 feet away to fill out paperwork.

After Staudenmayer finished searching defendant's car, he realized that he had misplaced his inventory form and began to look for it. While doing so, he spotted a package in the snow resembling a small submarine sandwich wrapped in plastic or cellophane, three or four feet from the car's left rear taillight (and a similar distance from the footprints he had seen near the driver's side). The package was wet on top but had not accumulated any snow. Staudenmayer picked it up and took it back to the CHP office.

As Andersen was doing paperwork, Staudenmayer walked into the briefing room holding the package in one hand. Defendant said: "That's not mine." Staudenmayer walked to Andersen's desk and gave him the package. It had a white powdery substance inside the cellophane wrapping, and Andersen suspected the package contained narcotics.

After the other officers had left the briefing room, defendant asked Andersen: "Where did he get it?" Andersen falsely stated: "[I]n the car." Defendant said: "You did . . .," then fell silent, hung his head, and looked at the floor.

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defendant's motion to strike the testimony and admonished the jury to disregard it.

Later, after waiving his *Miranda* rights, defendant said that he had bought his car the day before in Modesto for $9,500 in cash from Hector Gonzales (whom he had met through a friend he could not name); he did not receive a pink slip or bill of sale. He came from Florida, but had been living with his brother in Modesto for three weeks; however, he did not know his brother's address or telephone number. When stopped, he had been driving to Portland, Oregon, to visit a friend in the hospital; however, he did not know his friend's name, address, or telephone number, or the name of the hospital. Defendant was unemployed.

CHP Officer Eric Degraffenreid, a narcotics expert, inspected the package found by Staudenmayer. As he unwrapped it, he noticed baby wipes, often used to distract drug-sniffing dogs, within the cellophane. He then found a plastic bag containing a large amount of what appeared to be crystal methamphetamine, the drug's more potent form. The bag and its contents weighed 358.15 grams.[6]

According to Degraffenreid, a usable amount of methamphetamine equals .02 gram to .1 gram; a typical amount for sale would be one-half gram to one gram. Street-level dealers in Siskiyou County dealt in amounts from a few grams to half an ounce. The amount found here, uncommon for Siskiyou County, suggested "a very major dealer." It would be worth $5,000 to

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[6] The parties stipulated that the substance itself weighed 348.32 grams and contained methamphetamine.

$12,000 wholesale, but if broken up in smaller amounts it could be worth at least $35,000. Degraffenreid opined that it was possessed for sale.

Defendant did not testify or put on evidence.

After the People rested, defense counsel moved orally for a directed verdict of acquittal on count 3 (Pen. Code, § 1118.1). Counsel argued that the People had not satisfied the corpus delicti rule as to that count because they had not offered any evidence, aside from defendant's statements, of the "element" of transporting methamphetamine from a noncontiguous county (Stanislaus County).

After hearing argument, the trial court ruled as follows:

"Okay. First of all, I do acknowledge that this is not a clear-cut area of the law, but in this particular case, at least, if the jury finds that the defendant, in fact, was the person who had this substance, then there is ample evidence for a decision of conviction on counts 1 and 2, if they were to decide that.

"All that count 3 adds to the mix, if you add the elements of . . . counts 1 and 2 together, all that's added is the non-contiguous-counties aspect.

"The underlying purpose, it seems to me, of the corpus delicti rule is to prevent someone from being convicted of a crime that essentially never happened because of their own statements.

"That really cannot happen in this particular case because he's either going to be found to have been the person who had the substance that we're talking about, or he's not.

"So, recognizing that this is [an] unsettled area, this is undoubtedly going to be an appeal issue, I do believe that the non-contiguous[-]county aspect is not part of the corpus delicti. I could be absolutely wrong, and the court of appeal could disagree with me, but that's the way it appears to me.

"I also think that there is some very thin evidence that the defendant started from a non-contiguous county and that there is evidence of his residence out of state. I must say that's very thin. Whether that's enough in and of itself to attack the problem from the direction of . . . some evidence, however thin, supporting an element of the crime, I'm not confident of that at all. But I'm essentially ruling that the non-contiguous-county aspect is not a part of the corpus."

Over defendant's objection, the trial court instructed the jury with the following modified version of former CALCRIM No. 359:

"The defendant may not be convicted of any crime based on his out-of-court statements alone. Unless you conclude that other evidence shows someone committed the charged crime, you may not rely on any out-of-court statements by the defendant to convict him.

"The other evidence may be slight and need only be enough to support a reasonable inference that someone's criminal conduct caused an injury, loss, or harm. The other evidence

does not have to prove beyond a reasonable doubt that the charged crime actually was committed.[7]

"The identity of the person who committed the crime *and the issue of non-contiguous counties* may be proved by the defendant's statements alone.[8]

"You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt." (Italics added.)

DISCUSSION

I

Corpus Delicti

Defendant contends that the trial court violated the corpus delicti rule in instructing the jury that the element of section 11379, subdivision (b), that imposes an enhanced sentence for the transportation of illicit drugs between non-contiguous counties, may be proved on the basis of the defendant's statements alone. We disagree.

"Virtually all American jurisdictions have some form of rule against convictions for criminal conduct not proven except by the uncorroborated extrajudicial statements of the accused.

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7 This paragraph now reads: "That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed." (CALCRIM No. 359 (2007-2008) p. 137.)

8 In both the former and the current standard version of CALCRIM No. 359, this paragraph reads: "The identity of the person who committed the crime [and the degree of the crime] may be proved by the defendant's statement[s] alone." (CALCRIM No. 359 (2007-2008) p. 137; CALCRIM No. 359 (2006 (Thomson-West) p. 101.)

[Citations.] This rule is intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened. [Citations.]" (*Alvarez, supra,* 27 Cal.4th at p. 1169, fn. omitted.)

"Wigmore explains [the rule] this way: every crime 'reveals three component parts, *first* the *occurrence* of the specific kind of injury or loss (as in homicide, a person deceased; in arson, a house burnt, in larceny, property missing); *secondly*, somebody's criminality (in contrast, e.g. to accident) as the source of the loss, - these two together involving the commission of a crime by *somebody*; and *thirdly*, the accused's *identity* as the doer of this crime.' By the great weight of authority, the first two without the third constitute the *corpus delicti*." (1 LaFave, Substantive Criminal Law (2nd ed. 2003) § 1.4(b), p. 29, fns. omitted.)

California distinguishes between the evidentiary and the proof sides of the corpus delicti rule since "[it] is not a requirement of federal law, and it has no basis in California statutory law." (*Alvarez*, *supra*, 27 Cal.4th at p. 1173.) The evidentiary side of the rule, that "restrict[s] the *admissibility in evidence* of otherwise relevant and admissible extrajudicial statements of the accused," has been abrogated by section 28(d) of the California Constitution (the "truth-in-evidence" law). (*Alvarez*, at p. 1177.) However, "section 28(d) did not eliminate the independent-proof rule . . . that prohibits *conviction* where the only evidence that the crime was

committed is the defendant's own statements outside of court." (*Id.* at p. 1180.)

Thus, the rule in California: "In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself -- i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant. [Citations.]" (*Alvarez, supra*, 27 Cal.4th at pp. 1168-1169.) This includes "preoffense statements of later intent as well as . . . postoffense admissions and confessions . . . ." (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, relying on *People v. Beagle* (1972) 6 Cal.3d 441, 455.) The purpose of the corpus delicti rule is to satisfy the policy of the law that "one will not be falsely convicted, by his or her untested words alone, of a crime that never happened." (*Alvarez*, *supra*, 27 Cal.4th at p. 1169.)

The corpus delicti rule in California thus requires proof of every element of the "body of the crime" necessary to show "the commission of a crime by *somebody,"* i.e. "the fact of injury, loss, or harm, and the existence of a criminal agency as its cause." (*Alvarez*, *supra*, 27 Cal.4th at p. 1168.) However, for these reasons it does not include the identity of the perpetrator or the criminal agency of the defendant (*People v. Alcala* (1984) 36 Cal.3d 604; *People v. Westfall* (1961) 198 Cal.App.2d 598, 601), the degree of the crime (*People v. Cooper*

(1960) 53 Cal.2d 755, 765), or the facts necessary for the enhancement of the penalty for an offense (*People v. Shoemake, supra,* 16 Cal.App.4th at pp. 252, 256).[9]

In this case there is no claim the elements of the underlying offense of subdivision (a) of section 11379, that the crime of transporting illicit narcotics occurred, were not met without the defendant's statements. That fully satisfies the corpus delicti rule that requires proof of "the fact of injury, loss, or harm, and the existence of a criminal agency as its cause." (*People v. Alvarez*, *supra*, 27 Cal.4th at p. 1168.) Subdivision (b), upon which the defendant relies, did no more than enhance the "penalty provisions of subdivision (a)" when any person "transports for sale any controlled substances specified in subdivision (a) within this state from one county

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[9] In California "'[the] independent proof [of the corpus delicti], may be [proved by] circumstantial evidence [citation], and it need not be beyond a reasonable doubt. A slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient. [Citations]. If the independent proof meets this threshold requirement, the accused's admissions may then be considered to strengthen the case on all issues.'" (*People v. Robbins* (1988) 45 Cal.3d 867, 885-886, quoting from *People v. Alcala, supra,* 36 Cal.3d at pp. 624-625; see also *People v. Jennings* (1991) 53 Cal.3d 334, 368.) Thus, in *People v. Jones* (1998) 17 Cal.4th 279, 302 [circumstantial evidence of oral copulation was inferred by multiple sexual acts], in *People v. Robbins, supra,* 45 Cal.3d at p. 886 [the evidence of victim's unclothed body was evidence of defendant's pedophilia and victim's age sufficient to infer lascivious act on minor]; and in *People v. Jennings, supra,* 53 Cal.3d at p. 364 [the evidence of the permanent deprivation of car was inferred from burned car near victim's body].)

to another noncontiguous county . . . ." (See *People v. Shoemake, supra,* 16 Cal.App.4th 243.)

II

Defendant also contends that the evidence aside from his extrajudicial statements was insufficient to prove the noncontiguous-county factor as to count 3. Because those statements could be used to prove this factor and defendant does not claim that the evidence including those statements was insufficient, his contention fails.

III

Defendant contends that certain of his statements were wrongly admitted in violation of *Miranda*. Because trial counsel conceded the admissibility of these statements when moving successfully to exclude other statements on *Miranda* grounds, defendant also contends that counsel was ineffective on this issue. We find that the statements were clearly admissible and counsel's concession was therefore proper.

Defense counsel moved orally in limine to suppress some of defendant's out-of-court statements for alleged *Miranda* violations. The trial court conducted a hearing pursuant to Evidence Code section 402 at which Officer Andersen recounted what happened before he gave defendant *Miranda* advisements.

Andersen's testimony

After pulling defendant over, asking about his identification, and learning that his driver's license was suspended, Andersen discovered that the rear license plate was registered to a different person and a different car. Andersen

told defendant to step out of the car and come over to him. They went around to the front of Andersen's patrol car, where he told defendant to stay. Andersen then found that the VIN on defendant's car did not match the license plate. At that point Officer Staudenmayer arrived and began an inventory search of the car at Andersen's request. Filling out a citation, Andersen told defendant that he was being detained "because I wasn't sure what I had, if I had a stolen car at that point or not," and handcuffed him.

While defendant was detained and handcuffed in front of Andersen's patrol car, Andersen asked him where he got the car "or if it was his car." Defendant said he had bought it the day before in Modesto for $9,500 in cash, but did not receive a pink slip or bill of sale.

At this point, Andersen uncuffed defendant and started to write a ticket for the violations observed up to then. However, Staudenmayer yelled that he had found a Florida license plate in defendant's trunk. Andersen stopped writing the ticket and told Staudenmayer to run a registration check on the license plate. Dispatch informed Staudenmayer that the plate was stolen. Andersen then told defendant that he was under arrest for the stolen license plate, handcuffed him again, and placed him in Andersen's patrol car. (*Ibid*.)

At the CHP station, after seating defendant in a chair in the briefing room, uncuffing one of defendant's hands, and cuffing the other to a bolt in the wall, Andersen went back to his desk to start his paperwork. Staudenmayer walked in,

holding a package in one hand. Defendant said loudly: "That's not mine." The other officers in the room started chuckling. Staudenmayer walked over to Andersen's desk and gave him the package, explaining how it was found.

After the other officers left, defendant said: "Where did he find that?" Andersen lied and said: "[H]e found it in the car." Defendant blurted loudly: "You did . . ." Then he stopped. Andersen asked: "What did you say?" Defendant did not respond verbally, but dropped his head and would not meet Andersen's eyes. Andersen had looked at the package and felt sure that it contained illegal drugs.

About an hour later, Andersen gave defendant his *Miranda* advisements. Defendant agreed to answer Andersen's questions and did so.

The trial court's rulings

The trial court found that defendant's statements after Staudenmayer brought the package into the briefing room did not result from interrogation. Defense counsel responded that he was not trying to exclude those statements: "[The] focus of this motion is not the comments that Mr. Miranda made when he was presented with the . . . drugs. It's what was made out at the scene, admissions, talking about where he was going, talking about who he bought the car from, and all those comments were made when he was detained, and he hadn't been advised, and he was certainly in custody at that time. [¶] So, those are the ones that I'm really objecting to -- focusing on."

When the court opined that the statements at the CHP office were far more damaging to defendant than his earlier statements, counsel replied: "*Well, your Honor, I never tried to . . . suppress those statements because . . . I concur with the court that those are spontaneous and not the result of interrogation*." (Italics added.)

The court ruled: (1) The statements defendant made from the time he was first handcuffed until he was uncuffed again were inadmissible because they resulted from custodial interrogation without *Miranda* advisements. (2) All statements made after that time were admissible.

Analysis

Defendant asserts that his pre-advisement statements at the CHP office should have been excluded because he was in custody and the officers elicited the statements without *Miranda* advisements through the "functional equivalent" of interrogation. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301 [64 L.Ed.2d 297, 307-308].) Anticipating the argument that the contention is forfeited because trial counsel did not seek these statements' exclusion, he also asserts that counsel was ineffective in failing to do so. We are not persuaded.

Miranda bars the admission of a defendant's statements if made in custody, in response to interrogation or its functional equivalent, and without proper advisements. (*People v. Ochoa* (1998) 19 Cal.4th 353, 401; *People v. Mickey* (1991) 54 Cal.3d 612, 648.) The functional equivalent of interrogation is police conduct which the officers should reasonably expect to elicit a

potentially incriminating response from the defendant. (*People v. Mickey, supra*, 54 Cal.3d at p. 648.) Speech or conduct by the police which would not reasonably be construed as calling for a response from the defendant is not interrogation. (*People v. Clark* (1993) 5 Cal.4th 950, 985.) A defendant's statements which are volunteered or spontaneous, not the product of interrogation or its functional equivalent, are not subject to suppression under *Miranda*. (*People v. Ray* (1996) 13 Cal.4th 313, 337; *People v. Mickey, supra*, 54 Cal.3d at p. 648.)

In reviewing a claimed *Miranda* violation, we accept the trial court's resolution of disputed facts, including credibility issues, if supported by substantial evidence, but we independently determine whether the challenged statements were obtained illegally. (*People v. Wash* (1993) 6 Cal.4th 215, 235-236.)

Here, defendant said "That's not mine" when Officer Staudenmayer walked into the briefing room carrying the package, then asked Officer Andersen "Where did he find that?" after Staudenmayer put it down on Andersen's desk. According to defendant, "[O]fficer Staudenmayer marched up with the package of suspected narcotics and placed it on the desk, confronting appellant with the evidence against him[.]" But, in fact, Staudenmayer never physically "confronted" defendant "with the evidence against him" -- Staudenmayer merely carried the package past him on the way to Andersen's desk, 25 to 30 feet across the room from defendant's chair. Neither officer spoke to defendant

at that point or made any gesture directed at him. Defendant's outbursts were spontaneous and volunteered.

When Andersen told defendant falsely that Staudenmayer found the package "in the car," defendant said: "You did . . .," then fell silent and looked down. Since Andersen was answering defendant's question, not asking him one, Andersen's remark cannot reasonably be called interrogation or its functional equivalent. (Indeed, if Andersen had not answered, such pointed silence would surely have appeared deliberately calculated to provoke further statements from defendant.) Thus, defendant's response, like his previous outbursts, was volunteered.

Defendant argues to the contrary, relying on *People v. Davis* (2005) 36 Cal.4th 510 (*Davis*). His reliance is misplaced.

In *Davis*, an Uzi associated with a murder had been confiscated. An officer initiated a conversation with the defendant, who was in a holding cell after refusing to waive his *Miranda* rights. After telling the defendant that special circumstance charges had been filed against him, the officer asked him: "[R]emember that Uzi?" The defendant said, "Yeah." (*Davis, supra,* 36 Cal.4th at pp. 552-553.) The officer told him to "[t]hink about that little fingerprint on [the Uzi]," then left.[10] (*Id.* at p. 553.)

The Supreme Court found that the officer's last comment was the functional equivalent of interrogation because it indirectly

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[10] In fact, as the officer knew, there was no fingerprint. (*Id.* at p. 552.)

accused the defendant of personally using the gun, which was likely to elicit a response from him. (*Davis, supra,* 36 Cal.4th at p. 555.)[11] But this comment, which came after the officer had already directly and unlawfully interrogated the defendant (*ibid*.), merely continued the ongoing interrogation by other means.

Here, by contrast, there was no ongoing interrogation of defendant but only a conversation which he spontaneously initiated. Moreover, unlike the ominous invitation by the officer in *Davis* to "[t]hink about" an alleged incriminating fact, after the officer had already told the defendant that he faced capital charges, here Officer Andersen had not told defendant anything about any charges he might be facing other than those on which he had been arrested. Thus, *Davis* is inapposite.

Because the statements which the trial court admitted were not obtained in violation of *Miranda*, trial counsel did not provide ineffective assistance by conceding their admissibility.

IV

Defendant contends, and the People concede, that the trial court erred by failing to instruct the jury sua sponte that it could not convict him both on count 3 and on the lesser included offenses charged in counts 1 and 2. He contends further that

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[11] However, because the defendant's further incriminating remarks were made to his cellmates after the officer had left, the court concluded that *Miranda* did not apply to them. (*Davis, supra,* 36 Cal.4th at p. 555.)

the error was prejudicial as to count 3; the People do not concede this point. We find that any error was harmless.

When defendant moved after the verdict to set aside his convictions on both counts 1 and 2 on this ground, the trial court granted the motion and set aside the convictions. Thus, any error is harmless because defendant obtained the same outcome he would have obtained had the error not occurred.

Defendant asserts that this outcome does not refute his claim of prejudice because the jury might have been improperly swayed to convict on count 3 (on which, according to him, the evidence was insufficient) by its deliberations on the other counts. He urges us to reverse his conviction on count 3 and remand the matter so that the prosecution may decide whether to refile one or more of the charges, and if it did not then the convictions on the lesser offenses would be subject to reinstatement. We decline to do so, for two reasons.

First, defendant's argument improperly invites us to speculate as to the jury's deliberations. Second, as we have explained above, defendant cannot show prejudice from being convicted on count 3 because the evidence on that count was sufficient.

V

Defendant contends that the trial court's imposition of the upper term on count 3 violated *Cunningham, supra*, 549 U.S. ___ [166 L.Ed.2d 856]. We disagree.

Sentencing

After granting defendant's motion to set aside his convictions on the lesser included offenses and denying his request for probation, the court imposed the upper term on the following grounds, stated in this order: (1) The jury had found that the methamphetamine which defendant was transporting was in crystalline form. (2) The methamphetamine was a large quantity.[12] (3) Defendant's prior convictions as an adult were of increasing seriousness. (4) Defendant's prior performance on probation was unsatisfactory.

Analysis

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490 [147 L.Ed.2d at p. 435].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by defendant; thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact

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[12] Although the court did not say so, this was also found by the jury (but only as to count 1, the allegation having been stricken from the information as to the other counts). The jury found that the methamphetamine was in crystalline form as to all three counts.

findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely v. Washington* (2004) 542 U.S. 296, 302-305 [159 L.Ed.2d 403, 413-414] (*Blakely*).)

Accordingly, in *Cunningham, supra,* 549 U.S. ___ [166 L.Ed.2d 856], the United States Supreme Court overruled the California Supreme Court's holding in *People v. Black* (2005) 35 Cal.4th 1238 that the judicial fact-finding necessary to impose an upper term does not violate *Blakely*. Yet *Blakely*'s proscription does not apply to the use of prior convictions to increase the penalty for a crime. (*Cunningham, supra,* 549 U.S. ___, ___ [166 L.Ed.2d at p. 869.) A single valid aggravating factor justifies an upper-term sentence. (*People v. Osband* (1996) 13 Cal.4th 622, 728.)

In *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), our Supreme Court held that, under *Cunningham*, when a trial court uses a "legally sufficient aggravating circumstance" to impose the upper term, it does not matter whether other aggravating circumstances the court relied on were improper. (*Id.* at p. 816.) A legally sufficient aggravating circumstance is one which "has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Ibid*.)

Here, the trial court based its sentence on two aggravating factors tried to the jury and found true beyond a reasonable doubt -- the methamphetamine's crystalline form, and the fact that the amount exceeded 57 grams -- plus the increasing

seriousness of defendant's prior convictions and his poor performance on probation. Though defendant raises disputes about the last three factors, he concedes the first. Since a single valid aggravating factor suffices under *Black II*, that ends the discussion. Defendant's attack on his sentence fails.

VI

Remand is required, however, based on defendant's final contention: that two of the fines imposed by the trial court were either unauthorized or inadequately explained. The People concede the point and join defendant in asking for a remand. We accept the People's concession.

The trial court imposed a $160 fine as a drug program fee (§ 11372.7), and another $160 fine as a criminalist laboratory fee (§ 11372.5).[13] Each fine included unquantified penalty assessments.

The provisions on which the trial court relied do not, on their face, permit fines above $150, and the court did not explain on the record how it arrived at the amounts it imposed.

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[13] Section 11372.5 provides in part: "(a) Every person who is convicted of a violation of Section . . . 11379 . . . shall pay a criminal laboratory analysis fee in the amount of fifty dollars ($50) for each separate offense. The court shall increase the total fine necessary to include this increment."

Section 11372.7 provides in part: "(a) Except as otherwise provided in subdivision (b) or (e), each person who is convicted of a violation of this chapter shall pay a drug program fee in an amount not to exceed one hundred fifty dollars ($150) for each separate offense. The court shall increase the total fine, if necessary, to include this increment, which shall be in addition to any other penalty prescribed by law."

Thus, these fines appear to be unauthorized, and defendant's failure to object below does not forfeit his claim of error. (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1519.)

"Although we recognize that a detailed recitation of all the fees, fines, and penalties on the record may be tedious, California law does not authorize shortcuts. All fines and fees must be set forth in the abstract of judgment. [Citations.]" (*People v. High* (2004) 119 Cal.App.4th 1192, 1200.)

On remand, the trial court is directed to set out in full the basis for all fines and fees imposed. If the court determines that the sums it originally imposed under Health and Safety Code sections 11372.5 and 11372.7 are unauthorized, it shall correct them accordingly.

DISPOSITION

The fines imposed by the trial court pursuant to Health and Safety Code sections 11372.5 and 11372.7 are vacated and the matter is remanded for further proceedings in accordance with opinion. In all other respects, the judgment is affirmed.

BLEASE, Acting P. J.

I concur:

DAVIS, J.

I concur in the judgment and in parts II through VI of the majority opinion.

I concur in the result reached in part I, dealing with the corpus delicti rule, but I respectfully disagree with the majority's analysis. The majority reason that the corpus delicti rule requires independent evidence to establish every element of an offense, but transportation between noncontiguous counties is not an element of the offense.

My argument is the reverse: I think transportation between noncontiguous counties is an element of the offense defined by Health and Safety Code section 11379, subdivisions (a) and (b),[1] but I do not think current California law requires independent proof of every element of a crime to satisfy the corpus delicti rule. Rather, I think it is sufficient for independent evidence to show that *some crime* was committed. In this case, I do not have to decide whether proof of a misdemeanor would suffice, because here the evidence showed commission of the crime of felony transportation of a controlled substance.

The first question is whether transportation between noncontiguous counties is an element of the offense of which defendant was convicted.

The majority argue that section 11379, subdivision (b), is merely a penalty provision, like an enhancement, to which the

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[1] References to section 11379 are to this statute.

corpus delicti rule does not apply. In my view, and with respect, this is a wholly artificial distinction. Surely subdivision (b) of section 11379 contemplates that the prosecution must prove transportation between noncontiguous counties and that the jury must find this fact true. In this case, the jury was so instructed as follows:

"The defendant is charged in Count 3 with Transportation of Methamphetamine, a Controlled Substance, Between Noncontiguous Counties for Purposes of Sale.

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant transported a controlled substance;

"2. The defendant knew of its presence;

"3. The defendant knew of the substance's nature or character as a controlled substance;

"4. When the defendant transported the controlled substance, he intended to sell it;

"*5. The defendant transported the controlled substance between noncontiguous counties;*

"6. The controlled substance was Methamphetamine";

"AND

"7. The controlled substance was in a usable amount." (Italics added.)

What sense does it make to say that "[t]he defendant knew of its presence" is an element of the offense but "[t]he defendant transported the controlled substance between noncontiguous counties" is not an element?

The prosecution must prove both.

The jury must find both.

So what sense does it make to say transportation between noncontiguous counties is not an element of the offense? In my view, none.

I would adopt the definition of "element of an offense" set out in section 1.13, subdivision (9), of the Model Penal Code as follows:

"(9) 'element of an offense' means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as

"(a) is included in the description of the forbidden conduct in the definition of the offense; or

"(b) *establishes the required kind of culpability*; or

"(c) negatives an excuse or justification for such conduct; or

"(d) negatives a defense under the statute of limitations; or

"(e) establishes jurisdiction or venue." (10A part 1, West's Uniform Laws Annotated (2001) p. 91; italics added.)

Proving that a controlled substance was transported between noncontiguous counties "establishes the required kind of culpability" (an increased sentence) and is therefore an element of the offense.

The majority say that the corpus delicti rule "requires proof of every element of the 'body of the crime." I respectfully disagree.

Thus, most recently, our Supreme Court said in *People v. Alvarez* (2002) 27 Cal.4th 1161, "The independent proof [required] may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. [Citations.] *There is no requirement of independent evidence 'of every physical act constituting an element of an offense,' so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency*. [Citation.] In every case, once the necessary quantum of independent evidence is present, the defendant's extrajudicial statements may then be considered for their full value to strengthen the case on all issues. [Citations.]" (*Alvarez, supra*, 27 Cal.4th at p. 1171; italics added.)

An examination of *People v. Jones* (1998) 17 Cal.4th 279, relied on in *Alvarez*, makes clear that the People need not adduce evidence of every element of an offense in order to satisfy the corpus delicti rule. There, as pertinent, defendant contended the trial court had erred in denying his motion, brought pursuant to Penal Code section 995, to dismiss a charge of oral copulation, on the ground the corpus delicti of the crime had not been proved. (*Id*. at p. 299.)

Our Supreme Court concluded the corpus delicti rule had been satisfied, reasoning as follows:

"As the facts are undisputed, in this case we are faced only with the legal question of whether there was sufficient evidence to establish the corpus delicti of oral copulation.

Section 288a, subdivision (a), defines this crime as 'the act of copulating the mouth of one person with the sexual organ or anus of another person.'

"Keeping in mind the low threshold of proof required to satisfy the corpus delicti rule, we conclude that the magistrate erred in finding this low threshold was not met by the evidence presented at the preliminary examination. The state of the victim's clothing (no underwear or shoes) and the forensic evidence (semen in the victim's vagina and on her external genitalia and anus) indicates multiple sexual acts occurred. That the victim was forcibly abducted, beaten, shot in the head, and left by the side of the road for dead gives rise to an inference that the sexual activity that occurred was against the victim's will. This circumstantial evidence of multiple forcible sexual acts sufficiently establishes the requisite prima facie showing of both (i) an injury, loss or harm, and (ii) the involvement of a criminal agency.

"Defendant, however, contends that the prosecution failed to establish the corpus delicti of oral copulation because no semen was found in the victim's mouth. In other words, he argues that the lack of evidence of the *specific loss* or harm to this victim is fatal to the establishment of the corpus delicti. The law's requirements, however, are not so strict. Two previous cases involving application of the rule to a charged sexual assault are illustrative. In *People v. Jennings, supra*, 53 Cal.3d 334, the body of the victim, a known prostitute, was found in an irrigation canal in a rural area. She was

unclothed, and although forensic examination detected she had suffered a broken jaw, the advanced decomposition of her body made determining whether she had been sexually assaulted impossible. More specifically, there was no independent evidence that the defendant ever sexually penetrated the victim. (See § 263 ['Any sexual penetration, however, slight, is sufficient to complete the crime [of rape]'].)

"Despite the absence of any independent evidence of sexual penetration, we found that the trial court properly admitted evidence of the defendant's extrajudicial statement that he had raped the victim before killing her. Although we characterized the independent evidence of rape as '"thin"' (*People v. Jennings, supra*, 53 Cal.3d at p. 369), we nevertheless concluded that the unclothed condition of the victim's body, its location when found and the evidence of a broken jaw, considered together, were sufficient to establish the corpus delicti of rape.

"*People v. Robbins, supra*, 45 Cal.3d 867, is in accord. The evidence in *Robbins* showed that the victim, a six-year-old boy, was last seen riding on a motorcycle with an unknown blond man. The boy's skeletal remains were found three months later. The victim's neck had been broken and his body was found unclothed. The defendant had been diagnosed as a pedophile. Although the decomposed remains of the victim could not establish whether he had been sexually assaulted before his death, the defendant made an extrajudicial admission that he abducted the victim and sexually assaulted him before strangling

him. We found the trial court properly admitted this confession over a corpus delicti objection. (*Id*. at pp. 885-886.) 'In view of the nature of the offense and the circumstances of the case (i.e., the body was not discovered for some time, hence it was impossible to verify the sexual conduct by scientific evidence, and there were apparently no eyewitnesses to the crime) we do not believe the corpus delicti rule can be interpreted to call for more; the law does not require impossible showings.' (*Id*. at p. 886.)

"*People v. Jennings, supra*, 53 Cal.3d 334, and *People v. Robbins, supra*, 45 Cal.3d 867, require a similar result in the instant case. In all three cases, the victim's body was found unclothed (or partially clothed) in a location and condition suggesting the involvement of a criminal agency. *In all three cases, independent evidence of a certain element of a sexual crime was lacking:* penetration necessary for rape in *Jennings*, a touching of a child with lewd intent in *Robbins*, oral-genital or oral-anal contact in this case. As *Jennings* and *Robbins* demonstrate, *we have never interpreted the corpus delicti rule so strictly that independent evidence of every physical act constituting an element of an offense is necessary*. Instead, there need only be independent evidence establishing a slight or prima facie showing of some injury, loss or harm, and that a criminal agency was involved." (*People v. Jones, supra*, 17 Cal.4th at pp. 302-303; italics added.)

Here, even though transportation from one county to a noncontiguous county was an element of the offense, the People

did not have to prove it by independent evidence, just as they did not have to prove single elements in the cases collected in *People v. Jones, supra*, 17 Cal.4th at pages 302-303. Rather, the People's burden was to make "some slight or prima facie showing of injury, loss, or harm by a criminal agency." (*Alvarez, supra*, 27 Cal.4th at p. 1171.) The People made this showing by adducing evidence, apart from any statements of defendant, that a quantity of methamphetamine, sufficient for sale, was found near defendant's car, several feet from where he had been seen walking, shortly after he was stopped. This prima facie showing of defendant's felony violation of section 11379, subdivision (a) (transportation of a controlled substance), was sufficient to satisfy the corpus delicti rule with respect to a violation of section 11379, subdivision (b). Defendant's contention to the contrary is not meritorious.

In the circumstances of this case, the trial court did not err in instructing as it did on the corpus delicti rule.

SIMS, J.